Public Prosecutor v Zulkifli bin Arshad

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–50 OF 2007(J)
AUGUSTINE PAUL, HASHIM YUSOFF AND MOHD GHAZALI FCJJ
2 APRIL 2010

Criminal Law — Dangerous drugs — Trafficking — Presumption — Joint charges of trafficking in 5796.7g of cannabis and 3867.2g of cannabis — Actual possession proved — Whether failure to invoke presumption under s 37(da)(vi) of the Dangerous Drugs Act 1952 fatal to prosecution's case — Dangerous Drugs Act 1952 ss 37(da)(vi), 39A(2) & 39B(1)(a)

SP7 led a police team to Batu Pahat targeting a Proton Iswara car bearing registration No JCQ 2852. Upon spotting the targeted car parked near some public telephones, SP7 and SP10 approached the targeted car. Only the respondent was inside. The respondent tried to get out of the car but was restrained by SP10. A body search of the respondent revealed nothing. SP7 found a black Nike AEG bag on the rear passenger seat. The respondent then tried to flee but did not succeed. SP7 found six compressed slabs of plant material wrapped in a translucent plastic inside the bag. This was subsequently found to be 5,796.7g of cannabis, the subject matter of the first charge. After questioning, the respondent was taken to a house. Using a set of keys seized by SP7 from the front left pocket of the jeans worn by the respondent, SP7 opened the front grille and wooden doors and entered the said house. It was an empty house. The door to the third room was unlocked using another key from the same set seized earlier from the respondent. Inside the room, SP7 found four compressed slabs of dried plant material wrapped in translucent plastic. This was later found to be 3,867.2g of cannabis, the subject matter of the second charge. The respondent was charged with, convicted and sentenced to death by the High Court on two charges of trafficking in dangerous drugs contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Upon the respondent's appeal, the Court of Appeal substituted the convictions under s 39B(1)(a) with that under s 6 read with s 39A(2) of the Act. The respondent was then sentenced to 18 years imprisonment on each charge and also ordered to be given ten strokes of the rattan. Hence the prosecution's appeal to the Federal Court. The learned DPP submitted that the Court of Appeal erred, inter alia, on the following issues: (i) in holding that there was no evidence that showed a nexus between the drugs in the house and in the car; and (ii) in not invoking the presumption of trafficking.

Held, allowing the appeal:

(1) The learned trial judge had considered the first charge separately from the

second and had given his reasons why he found as a fact that the respondent was trafficking the drugs in the said car. The trial judge had also considered the second charge in full and also given his reasons as to why the drugs found in the bedroom of the empty house, amounted to trafficking by the respondent (see para 17).

(2) The learned trial judge found as a fact that the respondent was in actual possession of the drugs in the car and in the house. The only flaw, was that both the High Court and the Court of Appeal did not invoke the presumption under s 37(da)(vi) of the Act. But on the facts and evidence, this was not fatal to the prosecution. Having been established as a fact by the trial judge that there was actual possession of the drugs by the respondent, the weight of which exceeded 200g of cannabis, then the statutory presumption under s 37(da)(vi) came into play, justifying the trial judge's conclusion that the respondent was trafficking in those drugs (see paras 19 & 23–24).

(3) No injustice was occasioned to the respondent as he had the opportunity to raise a reasonable doubt in the prosecution case although the trial judge did not invoke the presumption. The trial judge had also considered the respondent's defence in detail (see para 25).

(4) On the evidence adduced, it was incumbent upon the Federal Court to apply the presumption under s 37(da)(vi) of the Act. The defence failed to rebut the presumption and failed to raise a reasonable doubt. The conviction and sentence by the Court of Appeal was thus set aside and the conviction and sentence of the High Court was restored (see paras 26–28).

[Bahasa Malaysia summary

SP7 mengetuai pasukan polis ke Batu Pahat dengan sasaran terhadap sebuah kereta Proton Iswara bernombor pendaftaran JCQ 2852. Selepas melihat kereta yang disasarkan diletakkan berhampiran telefon awam, SP7 dan SP10 menghampiri kereta tersebut. Hanya responden berada di dalam kereta. Responden mencuba untuk keluar daripada kereta tetapi dihalang oleh SP10. Carian badan responden tidak mendedahkan apa-apa. SP7 menjumpai sebuah beg Nike AEG hitam di tempat duduk penumpang di hadapan. Responden kemudian mencuba untuk melarikan diri tetapi tidak berjaya. SP7 menjumpai enam bongkah mampat bahan yang dibungkus dengan plastik lutsinar di dalam beg. Ini kemudiannya disahkan sebagai 5,796g kanabis, subjek perkara pertuduhan pertama. Selepas disoal siasat, responden dibawa ke sebuah rumah. Dengan menggunakan set kunci yang dirampas oleh SP7 daripada poket seluar jeans yang dipakai oleh responden, SP7 membuka gril hadapan dan pintu kayu dan memasuki rumah tersebut. Ia adalah rumah kosong. Pintu ke bilik ketiga dibuka menggunakan satu lagi kunci daripada set yang sama yang dirampas terlebih dahulu daripada responden. Di dalam bilik, SP7 mendapati empat

bongkah mampat bahan kering yang dibungkus dengan plastik lutsinar. Ini kemudiannya didapati adalah 3,867.2g kanabis, perkara subjek pertuduhan kedua. Responden dituduh, disabitkan dan dihukum mati oleh Mahkamah Tinggi atas dua pertuduhan pengedaran dadah berbahaya bertentangan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Atas rayuan responden, Mahkamah Rayuan menggantikan sabitan di bawah s 39B(1)(a) dengan s 6 dibaca bersama s 39A(2) Akta. Responden kemudian dihukum 18 tahun penjara bagi setiap pertuduhan dan diarah diberikan sepuluh kali rotan. Maka rayuan oleh pihak pendakwaan ke Mahkamah Persekutuan. Timbalan pendakwa raya yang terpelajar menghujah bahawa Mahkamah Rayuan terkhilaf, antara lain, atas isu-isu berikut: (i) dalam memutuskan bahawa tidak ada keterangan yang menunjukkan kaitan di antara dadah di dalam rumah dan di dalam kereta; dan (ii) dalam tidak membangkitkan anggapan pengedaran.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan telah mempertimbangkan pertuduhan pertama secara berasingan daripada yang kedua dan telah memberikan alasan mengapa beliau mendapati sebagai fakta bahawa responden mengedar dadah di dalam kereta tersebut. Hakim perbicaraan juga telah mempertimbangkan pertuduhan kedua secara keseluruhannya dan juga telah memberikan alasan-alasan mengapa dadah yang didapati di dalam bilik tidur rumah kosong tersebut, menjumlah kepada mengedar oleh responden (lihat perenggan 17).

(2) Hakim perbicaraan juga mendapati sebagai fakta bahawa responden mempunyai milikan sebenar dadah di dalam kereta dan di rumah tersebut. Satu-satunya kekurangan, adalah bahawa kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan tidak membangkitkan anggapan di bawah s 37(da)(vi) Akta tersebut. Tetapi di atas fakta dan keterangan, ini tidak menjejaskan pihak pendakwaan. Selepas membuktikan sebagai fakta oleh hakim perbicaraan bahawa terdapat milikan sebenar dadah oleh responden, berat yang melebihi 200g kanabis, oleh itu anggapan statutori di bawah s 37(da)(vi) beraplikasi, menjustifikasikan kesimpulan oleh hakim perbicaraan bahawa responden mengedar dadah tersebut (lihat perenggan 19 & 23–24).

(3) Responden tidak mengalami ketidakadilan kerana dia mempunyai peluang untuk membangkitkan keraguan yang munasabah ke atas kes pihak pendakwaan walaupun hakim perbicaraan tidak membangkitkan anggapan. Hakim perbicaraan juga telah mempertimbangkan pembelaan responden dengan teliti (lihat perenggan 25).

(4) Atas keterangan yang dikemukakan, ia adalah penting bagi Mahkamah Persekutuan untuk menggunakan anggapan di bawah s 37(da)(vi) Akta tersebut. Pihak pembelaan telah gagal mematahkan anggapan dan gagal untuk membangkitkan keraguan yang munasabah. Sabitan dan

hukuman oleh Mahkamah Rayuan oleh itu diketepikan dan sabitan dan hukuman Mahkamah Tinggi dikembalikan (lihat perenggan 26–28).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Muhammed Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64; [1980–1981] SLR 48, PC (refd)
PP v Abdul Rahim Kalandari Mustan [2008] 6 MLJ 161; [2008] 5 CLJ 108, FC (distd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 37(da)(vi), 39A(2), 39B(1)(a)

Appeal from: Criminal Appeal No J-05–39 of 2004 (Court of Appeal, Putrajaya)

Manoj Kurup (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the respondent.

Hashim Yusoff FCJ (delivering judgment of the court):

[1] At the time when this judgment was drafted, YA Dato' Sri Augustine Paul FCJ had passed away. However, YA Datuk Mohd Ghazali bin Mohd Yusoff FCJ had seen this judgment in draft and expressed his concurrence with it. This would form the majority judgment of the court.

AT THE HIGH COURT

[2] The respondent was charged with, convicted and sentenced to death by the Muar High court on 23 April 2004 on two charges of trafficking in dangerous drugs contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act').

[3] The first charge relates to trafficking in 5796.7g of cannabis in a 'Nike' bag found at the rear passenger seat of car registration No JCQ 2852 driven by the respondent at about 1am on 27 January 2001, at Km 10 Jalan Kluang, Batu Pahat, Johore.

[4] The second charge relates to trafficking in 3867.2g of cannabis found in the third room of a house No PS31-3, Parit Senkuang, Jalan Kluang, Sri

Gading on 27 January 2001 at about 1am.

AT THE COURT OF APPEAL

[5] The respondent's appeal to the Court of Appeal was allowed in part, ie the convictions under s 39B(1)(a) were substituted with that under s 6 read with s 39A(2) of the Act. He was then sentenced to 18 years imprisonment on each charge and also ordered to be given ten strokes of the rattan. The sentences of imprisonment were ordered to run concurrently.

Hence the public prosecutor's appeal to this court.

BRIEF FACTS

[6] On 27 January 2001 at 12.35am, SP7 led a police team of nine to Km 10 Jalan Kluang/Batu Pahat, Johore. Their target was a Proton Iswara car bearing registration No JCQ 2852. The men were stationed 1/2km apart beginning from Km 9.5 to Km 10.5. SP7 and SP10 proceeded together to Km 10.

[7] Upon arrival, SP7 saw the target car. It was parked near some public telephones in the direction of Kluang. SP7 parked about 1–2 meters behind the target car and instructed SP10 to go to the target car and get in. SP7 also got out and went to the driver's side. The side window was open, and the car's engine was still running. Only the respondent was inside.

[8] SP10 then got into the car at the front passenger's side. On seeing this SP7 reached into the car, switched off and removed the ignition keys. It then appeared as if the respondent tried to get out of the car but was restrained by SP10.

[9] SP7 then opened the door and ordered the respondent out. SP10 also got out and came over to guard the respondent. A body search of the respondent revealed nothing. Then SP7 inspected the car. He found a black Nike AEG bag (exh P6) on the rear passenger seat. He took it out and placed it on the road, and proceeded to unzip it. The respondent then tried to flee but did not succeed. He was subdued after a brief struggle with both SP7 and SP10.

[10] SP7 then examined the contents of exh P6. He found six compressed slabs of plant material wrapped in translucent plastic. This was subsequently confirmed by the chemist (SP9) to be 5,796.7g of cannabis, the subject matter of the first charge. The respondent was handcuffed and SP7 radioed in all his men to the site.

[11] The respondent was then questioned by SP7. The police party together with the respondent then proceeded to a house No PS31-3 at Parit Sengkuang, Jalan Kluang, Sri Gading, Batu Pahat, Johor. Using a set of keys seized by SP7 from the front left pocket of the jeans worn by the respondent, SP7 opened the front grille and wooden doors and entered the said house. The house was in complete darkness. SP7 then switched on the lights.

[12] What the police party saw was a house devoid of furniture, clothing, documents and any household items. As the learned High Court judge said, it was an empty house.

[13] The house had three rooms. The doors to the first and second rooms were ajar, and both rooms were empty. The door to the third room was, however, locked. Using another key from the same set seized earlier from the respondent, SP7 opened the door to the third room. It too was bare save for a large grey sheet at one corner of the floor. It appeared to be covering something. On checking, SP7 found four compressed slabs of dried plant material wrapped in translucent plastic. This was later confirmed by SP9 to be 3,867.2g of cannabis, the subject matter of the second charge.

[14] Before us the learned DPP raised four issues in his submission ie that the Court of Appeal erred:

(a) in holding that there is no evidence direct or indirect that showed a nexus between the drugs in the house and in the car;

(b) in not considering that the car JCQ 2852 was in the possession of the respondent since 1999;

(c) in not invoking the presumption of trafficking; and

(d) in not following the principles in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; [1980–1981] SLR 48 in respect of how actual trafficking is proved.

ISSUES (a) AND (b)

[15] The learned DPP submitted that although there were two charges, the learned trial judge had meticulously decided each charge on its own merits and did not lump the evidence one onto the other. Regarding the first charge, the learned trial judge said in his grounds of judgment (at p 32 of the appeal record 2):

> It was clearly proved that the accused was the sole occupant of JCQ 2852, and that the black bag and contents of cannabis were on the rear passenger seat of the same car that belonged to him. It was clearly proved that the accused had custody and

A control of JCQ 2852 at the material time, given the undisputed evidence that the accused was the sole occupant and was seated on the driver's seat of a car with its engine running at the material time.

Later at p 41 of the appeal record 2:

B The evidence was that the accused would have been aware of the incriminating nature of the contents in the black bag. If not, then there could not have been two separate apparent attempts on the part of the accused to flee from the scene.

The learned trial judge dealt with the second charge as follows:

C It was clearly proved that cannabis was recovered from a house that was under the sole control and management of the accused. The latter was proved by the following undisputed facts; (i) that the accused was the tenant of PS31-3, (ii) that the accused had possession of the keys to PS31-3 and the third bedroom, and, (iii) that PS31-3 was a bare and empty house totally bereft of all signs or articles of any human D habitation or occupation, which condition and state of PS31-3 said that there could not have been other tenants, other occupiers or other users of PS31-3, and further said that the accused must have had exclusive possession of PS31-3. That the accused had exclusive possession of PS31-3 and the keys to the third bedroom must lead to the inevitable deduction that the accused had possession of the drugs in the E third bedroom.

[16] Learned counsel for the respondent submitted that the Court of Appeal was correct when it found that the trial judge had seriously misdirected himself in holding that because it was a joint trial of the first and second charge against F the appellant, the 'evidence on record is seamless and indivisible and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession'.

G The 1st charge and 2nd charge are distinct and separate trafficking charges; one is trafficking in a car and the other, trafficking in a house.

It was further submitted that the trial judge was in error when His Lordship had relied on possession of drugs in the house to find possession against the H respondent in respect of drugs in the car.

[17] We agree with the submission of the learned deputy as in para 14 above that the learned trial judge had considered the first charge separately from the second and had given his reasons why he found as a fact that the respondent I was trafficking the drugs in the said car.

Similarly we agree with the learned deputy that the trial judge had also considered the second charge in full and also given his reasons, to which we agree, as to why the drugs found in the third bedroom of the empty house, amounted to trafficking also by the respondent.

ISSUE (c): WHETHER THE PRESUMPTION OF TRAFFICKING SHOULD HAVE BEEN INVOKED

[18] On this issue, both parties raised the question of the failure by the learned trial judge to invoke the presumption of trafficking under s 37(da)(vi) of the Act.

[19] In his grounds of judgment (p 75 of the appeal record 2) the learned trial judge had found 'the evidence in totality clearly said that the accused was in actual possession of the drugs in the car and in PS31-3, notwithstanding the fact that the slabs of drugs were not found on the physical body of the accused, and notwithstanding the fact, could it be so imagined that it could be so, that the accused had not tried to run off with the black bag.'

The learned deputy also referred to the finding of the Court of Appeal (at p 16 of the appeal record 1) 'The evidence adduced at its highest, in relation to the 1st charge, only justifies a finding of the offence of possession under s 6 punishable under s 39A(2) of the Act, as the learned trial judge did not invoke the trafficking presumption under s 37(da)(vi) of the Act, at the close of the prosecution's case to bring home the offence of trafficking.'

Premised on such finding by the Court of Appeal, it was submitted that the evidence adduced by the prosecution justifies the finding of possession of the cannabis by the respondent.

[20] The learned deputy referred to the case of *Muhammed Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 wherein this court held with respect to the presumptions of law as follows:

> The 'deemed' state of affairs in s 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie, the finding of custody or control. Such presumptions as under s 37(d) (and, for the matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law.

[21] Learned counsel for the respondent then submitted that since the learned trial judge did not invoke the statutory presumption under s 37(da)(vi) of the Act, there was a misdirection by the trial judge and it was therefore correct for the Court of Appeal to intervene and found a conviction on mere possession and not trafficking.

[22] Learned counsel then refer to the case of *Public Prosecutor v Abdul Rahim Kalandari Mustan* [2008] 6 MLJ 161; [2008] 5 CLJ 108 wherein it was held:

(1) The presumptions in ss 37(d) and 37(da) of the Act should not be applied together or in sequence to find an accused person guilty of trafficking in drug under the Act (see the Federal Court case of *Muhammed Hassan v Public Prosecutor*). If the presumption of trafficking was to be invoked there must first be a factual finding of possession.

(2) The prerequisites for the offence of trafficking as provided by the Act stipulate that (i) an accused has to be found in possession of the drug which include knowing the nature of the thing possessed, a vital element for the ingredient of possession; (ii) the quantity of drug found in possession must at least meet the statutory minimum amount specified depending on the nature of the drug found in possession; and (iii) the possession is otherwise than in accordance with the authority of the Act or any other written law. Hence, the prerequisites stipulate that to secure a conviction for trafficking it was not permissible to rely on the presumption under s 37(d) itself (*Muhammed Hassan v Public Prosecutor*).

(3) It would be grossly unfair to the respondent at the final appeal stage to invoke s 2 of the Act and review other evidence before the learned trial judge to arrive at a factual finding that there was trafficking in the drugs.

(4) In *Mohamad Yazri Minhat v Public Prosecutor*, it was said that whether a person was a trafficker in transporting a quantity of drugs from one point to another depended on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into. In the present case, there was nothing at all to indicate any proposed transaction of that sort (*Public Prosecutor v Abdul Manaf Muhamad Hassan* also distinguished).

(5) The facts and circumstances of the present case were much more favourable to the respondent. Unlike in the case of *Haryadi Dadeh v Public Prosecutor*, the learned trial judge in the present case had the opportunity to consider the evidence for actual possession and yet did not make such finding. Further, there was no evidence that the respondent made any attempt to escape, an overt act, unlike in *Haryadi*. In addition, there was also the issue of fairness to the respondent (see *Lim Hock Boon v Public Prosecutor*). Hence, it was not safe to state that had the learned trial judge properly directed himself on the facts and circumstances of the case, he would have drawn a reasonable inference that the respondent was in fact keeping the drugs for the purpose of trafficking. Therefore, it would be inappropriate for the Court of Appeal to invoke the proviso to s 60(1) of the Courts of Judicature Act 1964 in order to uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge.

[23] With respect, the case of *Public Prosecutor v Abdul Rahim* can be distinguished on the facts. In the instant appeal, the learned trial judge found as a fact that the respondent was in actual possession of the drugs in the car and in the house PS31-3. So did the Court of Appeal. The only flaw, as submitted, is that both the High Court and the Court of Appeal did not invoke the presumption under s 37(da)(vi) of the Act. But on the facts and evidence of this case that should not be fatal to the prosecution. We are of the view that having been established as a fact by the trial judge that there was actual possession of the drugs by the respondent, the weight of which exceeded 200g of cannabis, then the statutory presumption under s 37(da)(vi) must come into play since it provides:

> (da) any person found in possession of ...
>
> (vi) 200 grammes or more in weight of cannabis;
>
> otherwise than in accordance with the authority of this Act or any other written law, *shall be presumed, until the contrary is proved, to be trafficking* in the said drug. (Emphasise added.)

[24] In *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; [1980–1981] SLR 48 the Privy Council said at pp 69–70 (MLJ); pp 59–60 (SLR) as follows:

> So the presumption works as follows, when an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another:
>
> (1) the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in s 2; but if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under s 3, whether that purpose was achieved or not. This is the effect of the provisions of s 3(c) and s 10.
>
> (2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in s 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.
>
> So, in Their Lordships' view, the effect of the Drugs Act was stated with clarity and accuracy in the following passage of the judgment of the Court of Criminal Appeal in *Wong Kee Chin v Public Prosecutor*. The reference in this passage to the dictionary sense of the term transporting is to be understood as a reference, to its meaning as conveying from one point to another.

> When it is proved that the quantity of diamorphine which the accused person was transporting (in the dictionary sense of the term) was to or more grams, a rebuttable presumption arises under s 15(2) that the accused had the said controlled drug in his possession for the purpose of trafficking. Proof of the act of transporting plus the presumption under s 15(2) would constitute a prima facie case of trafficking which if unrebutted would warrant his conviction. In those circumstances the burden of proof would clearly shift to the accused and he would have to rebut the case made out against him. The rebuttal will depend upon the evidence place before the court. If he can convince the trial court by a preponderance of evidence or on the balance of probabilities that the drug was for his own consumption he would be entitled to an acquittal. Factors such as the type of 'transporting', the quantity involved, whether or not the accused is an addict, would be relevant. It would be a question of evidence and the inferences to be drawn from the totality of the evidence before the court.
>
> In the instant appeal, the drugs found in the car JCQ 2852 as well as those found in house No PS31-3 far exceeded the amount of 200g, to invoke the presumption under s 37(da)(vi) of the Act, to justify the learned trial judge's conclusion that the respondent was trafficking in those drugs.

[25] No injustice could have been occasioned to the respondent as he had every opportunity to raise a reasonable doubt in the prosecution case although the learned trial judge did not invoke the presumption. And the learned trial judge did consider the respondent's defence in detail at the end of which, His Lordship concluded that (p 76 of the appeal record 2):

> There is no gap in the prosecution case. There is no doubt that the accused was trafficking. The prosecution had proved that it could not have been anything else, beyond all reasonable doubt. All evaluation of the prosecution case and then of the defence gave that same result. Accordingly, on both counts, the accused is convicted and sentenced to the only punishment mandated by law.

[26] The same applies to the failure of the Court of Appeal for not applying the presumption under s 37(da)(vi). Be that as it may, we feel that on the evidence adduced by the prosecution, and upon the failure by the learned trial judge as well as the Court of Appeal to invoke the presumption, it is incumbent upon us to do so in accordance with the provision of s 37(da)(vi) of the Act.

[27] Having done that, we also agree with the finding of the learned trial judge that upon all evaluation of the prosecution case and then of the defence it gave the same result ie that the prosecution had proved its case beyond all reasonable doubt that the respondent was trafficking in drugs as per the two charges. We are satisfied that the learned trial judge had given a maximum evaluation of all the evidence before him and came to the right conclusion. The defence failed to rebut the presumption and also failed to raise a reasonable doubt.

[28] For the aforesaid reasons, we would allow this appeal. The conviction and sentence by the Court of Appeal is set aside and the conviction and sentence of the High Court are hereby restored.

Appeal allowed.

Reported by Kanesh Sundrum